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(3)

No. 09-1104

IN THE

Supreme Court of the United States

MARLENE WHITTIER, PETITIONER

v.

DANIEL KOBAYASHI, ERIC GOLDSTEIN,
ERIK PALACIO, ANDRE BRUNA, AND SEAN VISNERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' GOLDSTEIN AND PALACIO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether police officers are entitled to qualified immunity on a case-by-case analysis based on the totality of the circumstances to determine if arguable reasonable suspicion existed to justify a no-knock entry under the Fourth Amendment?

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JURISDICTION

The unpublished per curiam opinion of the U.S. Court of Appeals, Eleventh Circuit was entered on August 31, 2009. The Petitions for Rehearing and Rehearing En Banc were denied on November 9, 2009 with no Judge in regular active service on the Court requesting that the Court be polled. The Petitioner incorrectly cited the statute that invokes this Court's jurisdiction. Jurisdiction may be invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

In addition to the Fourth Amendment of the United States Constitution as cited by the Petitioner, this case also involves 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

STATEMENT

A. Execution of a "High-Risk" Search Warrant and Diotaiuto's Violent Threat to Officer Safety.

Early morning on August 5, 2005, SWAT team members including the Respondents were briefed before executing a "high-risk" search warrant. (Pet.App.B-3). Officers Goldstein and Palacio were provided with an operational plan as well as a "threat assessment" of Anthony Diotaiuto. (Pet.App.B-3). The Sunrise Police Department classified the warrant as "high risk" which the Department defined as "involving acts of violence or potential acts of violence." (Pet.App.B-3). Indeed, the execution of this high-risk warrant involved acts of violence when Diotaiuto did not comply with the police orders after their entry, racked his gun and pointed the semi-automatic pistol at the officers to shoot them. (Pet.App.B-4). Diotaiuto was shot by the officers, not Officers Goldstein or Palacio, in self-defense.

The "high risk" warrant was issued after a thorough law enforcement investigation of Anthony Diotaiuto, Petitioner's son. (Pet.App.B-3). The investigation commenced after learning from a neighbor, that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. (Pet.App.B-2). As a result, the police conducted surveillance of the Whittier/Diotaiuto residence and completed a "controlled buy" of marijuana by a confidential

informant. (Pet.App.B-2). This revealed that Diataiuto carried a semi-automatic hand gun on his person "at all times" and kept a loaded shotgun in his bedroom closet. (Pet.App.B-2-3). Diotaiuto had a criminal history of marijuana possession and the police learned that he not only sold drugs, but used the drugs too. (Pet.App.B-2).

The operational plan to execute the search warrant called for an eight (8) man SWAT team. (Pet.App.B-3). The team leader was responsible for knocking and announcing the presence of the SWAT team prior to entry. (Pet.App.B-3). Officer Goldstein and Officer Palacio made up the breach team who were responsible for opening the residence door if determined necessary by the SWAT team leader. (Pet.App.B-3).

At approximately 6am in the morning, the team leader approached the Whittier/Diotaiuto door while Goldstein and Palacio, along with rest of the SWAT team were positioned "in the stack" about five to ten feet away. (Pet.App.B-3). Fourteen police officers present on the scene along the perimeter of the residence testified that they heard the team leader knock and announce Sunrise's presence. (Pet.App.B-3). However, no neighbor heard the police knock and announce despite claiming that they would have heard it. (Pet.App.B-4). The SWAT team leader signaled for Goldstein and Palacio to breach the front door. (Pet.App.B-4). Officers Goldstein and Palacio followed the order and pried the door open. (Pet.App.B-4). This permitted the SWAT team to enter into what would prove to be a life threatening and dangerous law enforcement operation with Diotaiuto armed and ready to open fire on the police.

B. Proceedings Below

The district court denied summary judgment to Officer Goldstein and Officer Palacio on the basis that "issues of fact remain with respect to the circumstances surrounding any failure to knock and announce" and found the Officers were not entitled to qualified immunity. (Pet.App.E-17). However, the Eleventh Circuit Court of Appeals found Goldstein and Palacio were entitled to qualified immunity even if there was a "no-knock" entry because a reasonable officer could have had "arguable reasonable suspicion" under the circumstances to dispense with the knock and announcement requirement. (Pet.App.B-7). Specifically, the Eleventh Circuit declined to address whether exigent circumstances existed under the facts and did not disturb the lower court's determination. (Pet.App.B-9). Instead, the pertinent qualified immunity inquiry involved: "whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Goldstein and Palacio, *could have believed*" exigent circumstances existed. (Pet.App.B-9). Despite Petitioner's contention, no "blanket exception" to the knock and announce requirement was created.

REASONS FOR DENYING THE PETITION

THE COURT SHOULD DENY CERTIORARI ON THE BASIS THAT NO CONFLICT EXISTS WITH ANY PRIOR DECISION OF THIS COURT OR THE CIRCUIT COURTS IN THE CONTEXT OF A QUALIFIED IMMUNITY ANALYSIS UNDER THE FOURTH AMENDMENT AND A LEGITIMATE LAW ENFORCEMENT NEED FOR AN UNANNOUNCED ENTRY.

I. Petitioner Mischaracterized the Holding of the Court Below Which is Consistent with This Court's Rule of law.

Whittier concedes in her Petition, that the lower court's conclusion was based on qualified immunity, but relies solely on criminal cases where the suppression of evidence is at issue. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914 (1995); *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416 (1997), *Michigan v. Hudson*, 547 U.S. 586, 126 S.Ct. 2159 (2006). The Eleventh Circuit specifically concluded that Goldstein and Palacio were entitled to qualified immunity because a reasonable officer *could have* reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team. (Pet.App.B-8). The inquiry to determine if qualified immunity would apply to the claim under 42 U.S.C. §1983 was based on whether there was arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry. (Pet.App.B-9). The Eleventh Circuit did not even address whether exigent circumstances actually existed in the case. This case involved a fact-intensive inquiry of reasonableness.

Importantly, a "blanket exception" was not created to the knock and announce requirement by the Eleventh Circuit's analysis of reasonableness under the Fourth Amendment. While this Court rejected a categorical exception to the knock and announce rule for all searches in "felony drug" cases in *Richards v. Wisconsin*, 520 U.S. 385 (1997), it nonetheless found that the actions of the officers were reasonable based on the circumstances. *See id.* at 388. This Court's rejection of the blanket exception was based in part on the "overgeneralization" that felony drug cases involve a threat of violence and the destruction of drugs. *Id.* at 396.

The holding below is entirely consistent with this Court's previous decisions including those cited by Petitioner. This Court has recognized that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests". *Wilson v. Arkansas*, 514 U.S. at 934. In *Wilson*, this Court left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." *Richards*, 520 U.S. at 387 *citing Wilson v. Arkansas*, 514 U.S. at 936. This is exactly what the Eleventh Circuit accomplished and determined qualified immunity was appropriate.

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."

Richards, at 520 U.S. at 394. This standard is less than a probable cause showing. *Id.* The Court recognized, "[t]his showing is not high". *Id.* These facts are resolved with a "case-by-case evaluation of the manner in which a search was executed." *Richards*, 520 U.S. at 392.

Here, as the Eleventh Circuit noted, the "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to justify a no-knock entry was based on: (1) Diotaiuto receiving and selling narcotics at his residence; (2) Diotaiuto's criminal history; (3) Diotaiuto carrying a concealed semi-automatic handgun on his person; and (4) Diotaiuto possessing a shotgun that he kept in his bedroom. (Pet.App.B-8). These particularized facts, and not over-generalized notions that "guns and violence go hand-in-hand with illegal drug operations" as the Petitioner suggests, established that reasonable suspicion of exigent circumstances could have existed.

The pertinent inquiry of qualified immunity in this case was whether a reasonable officer *could have* had reasonable suspicion under the totality of the circumstances that a threat of violence existed to justify a no-knock entry. (Pet.App.B-7). This inquiry is supported by a combination of prior U.S. Supreme Court precedent involving the Fourth Amendment's knock and announce requirement and qualified immunity cases.

In fact, this Court's qualified immunity cases establish that the doctrine of qualified immunity shields officers from suit for damages if "a reasonable officer could have believed" his or her actions were lawful, in

light of clearly established law and the information the officers' possessed. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534 (1991). Even law enforcement officials who "reasonably but mistakenly" conclude that probable cause or reasonable suspicion is present are entitled to immunity. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040 (1987). The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Hunter*, 502 U.S. at 229.

At the time of the execution of the search warrant, there was no case in the U.S. Supreme Court or the Eleventh Circuit, that clearly established a no-knock entry would be unconstitutional under these circumstances where the drug-selling suspect had a criminal history and was armed with two guns including a semi-automatic gun on his person. Like the *Wilson* Court stated, the respondent's knowledge of a semi-automatic weapon in possession and the suspect's criminal history could have been "necessary justification for the unannounced entry", but remanded for the lower court to make the determination of reasonableness. *Wilson*, 514 U.S. at 937.

The Eleventh Circuit's determination of reasonableness involved a fact-intensive analysis in this case. Exigent circumstances did not have to exist in order for qualified immunity to shield the Respondents from liability. Given the doctrine of qualified immunity, even if Goldstein and Palacio were mistaken in believing that exigent circumstances existed to dispense with the knock and announce requirement, liability would not attach. *See Hunter*, 502 U.S. at 229.

Furthermore, the Petitioner erroneously argues that the analysis of the Eleventh Circuit is in derogation of this Court's prior precedent that rejects a blanket exception to the knock and announce requirement. To the contrary, the lower court's reasoning provides particularized and objective facts known to the officers at the time of their entry. Petitioner incorrectly surmises that simply because the search involved drugs, guns would be present and the exception would be created. Moreover, the Petitioner's reasoning in arguing that individuals who exercise their Second Amendment right to carry or possess weapons waive Fourth Amendment protection is equally misplaced. The Petitioner failed to recognize the other facts present to establish reasonable suspicion other than gun ownership in the instant case. These include a criminal history, a valid "high-risk" search warrant, and the specific facts surrounding Diotaiuto's guns especially intelligence that he was armed "at all times". The Petitioner's argument is a mischaracterization of the holding and record below.

The Eleventh Circuit used the specific factual knowledge of the officers regarding Diotaiuto at the time of the search which could have made them believe Diotaiuto posed a threat to their safety in order to justify an unannounced entry. The Respondents maintain that there was a "knock and announcement" made by the SWAT team leader. However, even under the Petitioner's version of the facts, no constitutional violation occurred. Goldstein and Palacio's conduct was reasonable under the circumstances.[1] Accordingly,

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[1] Although, it was not addressed by the Eleventh Circuit in its unpublished opinion, Goldstein and Palacio also argued they were

qualified immunity was properly granted and the lower court's opinion was consistent with this Court's prior precedent and the Fourth Amendment. Certiorari review of this case should be denied.

II. The Application of the Proper Standard to the Facts of the Present Case Does Not Create a Sister Circuit Conflict.

The Petitioner's repetitive and uncompelling reliance on a majority of criminal cases is misplaced. Actually, the Eleventh Circuit decision does not conflict with the Second, Sixth, Seventh, Eighth, and Tenth Circuit Court of Appeals. The Petitioner's cases do not reflect an analysis under the proper standard utilizing qualified immunity in a 42 U.S.C. §1983 case. It is true that the Fourth Amendment requires officers to knock and announce. However, in qualified immunity cases in the context of a purported knock-and-announce violation, the court is to determine whether exigent circumstances *could have* reasonably existed, even if officers are mistaken, as opposed to finding whether those circumstances existed or not. This is the integral analysis that is absent from the majority of the cases used by the Petitioner.

Some of the Petitioner's cases involve the application of 18 U.S.C. §3109 and the exclusion of evidence with findings that the officers were excused from the statute's compliance under the totality of the

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entitled to qualified immunity on the basis that no precedential case existed that clearly established an individual constitutional duty by each police officer to knock and announce prior to entry when executing a search warrant. *See Hodge v. Laryisson*, 226 F.3d 642 (5th Cir. 2000).

circumstances. *See U.S. v. Nabors*, 901 F.2d 135 (6th Cir. 1990)(holding 18 U.S.C. §3109 was not violated upon police entry when defendant was a felon in possession of firearms, the safety of those in apartment was jeopardized, and the need to preserve narcotic evidence); *U.S. v. Spinelli*, 848 F.2d 26 (2nd Cir. 1988)(excusing officers' non-compliance with 18 U.S.C. §3109 where the suspect had a past history of firearm possession and knowledge of the officers' surveillance); *U.S. v. Jones*, 208 F.3d 603 (7th Cir. 2000)(finding §3109 was not violated based on fact that defendant was a dangerous felon in possession of a gun). There is no language in these circuit cases that suggest they would find the unannounced entry in this case unreasonable under the Fourth Amendment. Additionally, despite Petitioner's reliance on *U.S. v. Marts*, 986 F.2d 1216 (8th Cir. 1993) and *U.S. v. Lucht*, 18 F.3d 541 (8th Cir. 1993) the Eighth Circuit, more recently in *U.S. v. Stevens*, 439 F.3d 983 (8th Cir. 2006) affirmed a magistrate's conclusion that a no-knock search was justified upon the presence of drugs and a sawed-off shotgun.

The remainder of cases cited by the Petitioner involved §1983 cases, but they do not conflict with the Eleventh Circuit's decision under the qualified immunity standard. In *Molina ex.rel Molina v. Cooper*, 325 F.3d 963 (7th Cir. 2003) qualified immunity was granted where the officers knew the suspected drug distributor owned a weapon and had a violent criminal past. At no time, did the Seventh Circuit exclude the possibility of granting qualified immunity if any of those factors were not present. *See id.* Moreover, in *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005) where a Fourth Amendment violation was found, the court held that a "drug raid alone" did not constitute a

"particularized" risk of evidence to warrant exigent circumstances. The *Wilhelm* case also involved a fatal defect in the warrant. *See id.* The *Wilhelm* case is distinguishable because Goldstein and Palacio had particularized facts about Diotaiuto and did not just conduct a drug raid. The Petitioner's last case, *Hernandez v. Conde*, 272 Fed. Appx. 663 (10th Cir. 2008), involved a warrant to search the wrong house which makes the case inapplicable to the current analysis.

Consistent among the Circuits and in accordance with this Court's prior rulings is that the knowledge of drugs present, as a blanket exception, is insufficient to establish a constitutional no-knock entry. *See supra.* In this case, the knowledge of Diotaiuto selling cocaine and marijuana are what led to an investigation. This investigation resulted in additional knowledge regarding his criminal record and possession of a semi-automatic handgun on his person at all times along with a loaded shotgun kept in his bedroom. The information possessed by the officers at the time the search warrant was executed is more than mere knowledge of Diotaiuto's drug enterprise, but particularized facts, including carrying a semi-automatic pistol on his person at all times, established a threat to their safety. In light of the events that occurred after the purported unannounced entry including Diotaiuto aiming his loaded gun at some of the officers, the police belief that exigent circumstances existed was reasonable.

None of the cases relied upon by the Petitioner support a conflict among the Circuits and the Eleventh Circuit decision. In fact, these cases show that the factual circumstances are evaluated on a case-by-case

analysis. That type of factually specific analysis is consistent with this Court's Fourth Amendment jurisprudence and qualified immunity cases. The Fourth Amendment's "touchstone is reasonableness", which is "measured in objective terms by examining the totality of the circumstances." *Ohio v.* Robinette, 519 U.S. 33, 39, 117 S.Ct. 417 (1996). In applying this test, this Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Id.* at 39. The Court should deny Certiorari review because there is no disagreement in the law to settle among the Circuits.

III. Preserving Qualified Immunity Protection for Law Enforcement Officers Where Exigent Circumstances Could Have Existed is an Important Public Policy to Maintain.

This Court has recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service. *See, e.g., Wood v. Strickland,* 420 U.S. 308, 319, 95 S.Ct. 992, 999 (1975) (denial of qualified immunity to school board officials "would contribute not to principled and fearless decision-making but to intimidation"). Qualified immunity protects government officials from civil liability for actions taken within their official discretion insofar as these actions do not violate clearly established statutory or constitutional rights of which a reasonable official would have been aware. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). It is not merely a defense to liability; rather, when applicable, qualified immunity protects

government officials from lawsuits and, hence, the burdens of litigation. *See Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S.Ct. 2151 (2001). When presented with the defense of qualified immunity, courts must decide, in no particular order, whether a constitutional violation occurred and if the law was clearly established at the time. *See Pearson v. Callahan*, ___, U.S. ___, 129 S.Ct. 808 (2009).

In the present claim against Officers Goldstein and Palacio, these officers were "in the stack" during a para-military operation where the SWAT team was utilized to execute the "high-risk" search warrant. "[P]olice officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989). Any hesitation by the Respondents could have endangered officer safety. There was no clearly established law, despite the Petitioner's contention, indicative to the officers that an unannounced entry under the particularized facts known would violate the Fourth Amendment.

A manifest danger to the officers existed in the Whittier/Diotaiuto residence on the basis of: Diotaiuto's use and distribution of narcotics; his criminal history; the semi-automatic handgun on his person at all times; and the loaded shotgun he kept in his bedroom. These particularized facts entitled Officer Goldstein and Officer Palacio to qualified immunity. The circumstances made it objectively reasonable for any officer to believe there was a threat of violence while performing their duties. The legitimate interest in protecting officers from threats of violence should

compel this Court to leave the lower court's decision undisturbed as a matter of public policy.

The constitutional requirement to "knock and announce" under the Fourth Amendment remains intact as a result of the Eleventh Circuit's decision. It made findings of fact related to the defense of qualified immunity and the reasonableness that exigent circumstances could have existed. The denial of Certiorari is appropriate.

CONCLUSION

WHEREFORE, Eric Goldstein and Erik Palacio respectfully request that the Petition for Writ of Certiorari be denied.

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